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STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. --------

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, AS AGENT UNDER SECTION 206, TRANSPORTATION ACT, 1920 (LOS ANGELES AND SALT LAKE RAILWAY COMPANY),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Industrial Accident Commission of the State of California, and O. J. Burton, respectfully pray for a writ of *certiorari* to the District Court of Appeal of the State of California, Second Appellate District, Division Two, to require that there be certified to this court for review and determination, a final judgment rendered by said District Court of Appeal, in a case entitled *John Barton*

Payne, as agent under section 206, Transportation Act (*Los Angeles and Salt Lake Railway Company*) vs. *Industrial Accident Commission of the State of California and O. J. Burton,* Civ. No. 3296, wherein there was drawn into question an authority exercised under the State of California on the ground of its being repugnant to the constitution and laws of the United States, and the decision therein was against the validity of said authority, and wherein there was claimed a right, privilege and immunity under an act of Congress, known as the Federal Employers' Liability Act of April 22, 1908, chapter 149, 35 Stat. 65 (amended in respects, not material here, on April 5, 1915), and the decision was in favor of such right, privilege and immunity.

This application is made under the provisions of section 237 of the Judicial Code, as amended September 6, 1916, chapter 448, 39 Stat. 726. The opinion of said District Court of Appeal of the State of California is not yet printed in the Pacific Reporter or in the official California Reports. A copy is set forth in the certified record, filed herein, and also is reprinted under this cover for the convenience of the court.

With this petition for *certiorari* we file a certified copy of the transcript of record in this case, which includes all proceedings in the District Court of Appeal of California.

In this petition we shall refer to the pages of the certified record as paged by the Clerk of the District Court of Appeal of California.

I.

BRIEF STATEMENT OF THE MATTER.

This case was originally that of a claim filed with the Industrial Accident Commission of California under the Workmen's Compensation, Insurance and Safety Act of 1917 of the State of California (chapter 586, California Statutes, 1917, as amended by chapter 471, California Laws, 1919), for an injury sustained by petitioner O. J. Burton, while employed as a machinist in the general shops of the Los Angeles and Salt Lake Railway Company, at Los Angeles, California. Said railroad was at said time under federal management, the original defendant herein being Walker D. Hines, Director General of Railroads, United States Railroad Administration. Subsequently, John Barton Payne, as agent under section 206, Transportation Act of 1920, was substituted by stipulation for Walker D. Hines. The principal defense before the Industrial Accident Commission was that this case fell within the provisions of the Federal Employers' Liability Act. The Industrial Accident Commission entered its award in favor of O. J. Burton upon the ground that the state workmen's compensation act was applicable, the injury not being within the federal act.

Under the California statutes, decisions of the California Industrial Accident Commission may be reviewed only by writ of *certiorari,* denominated in said statutes a writ of review. Such proceedings in *certiorari* or review can be instituted only in the

District Court of Appeal or in the Supreme Court of California. Proceedings in *certiorari* or review were instituted in this case within the proper time and in the proper manner by the Director General of Railroads, in the District Court of Appeal of California, Second Appellate District, Division Two. At the termination of such proceedings, said court entered its judgment annulling the award of the Industrial Accident Commission upon the ground that the claim was within the federal act. This judgment is the decision here sought to be reviewed by this court. A petition for rehearing was filed with the District Court of Appeal and denied by it. A petition for hearing in the Supreme Court of California, after final decision by the District Court of Appeal, was filed and denied by a vote of four to three, of the members of said Supreme Court.

II.

STATEMENT OF THE FACTS.

The facts relevant to the determination of the jurisdictional question are not controverted, although conflicting conclusions have been drawn below. The facts themselves are stated as follows:

At the time of Burton's injury, Walker D. Hines, as Director General of Railroads, United States Railroad Administration, was engaged as a common carrier in operating the railroad properties of the Los Angeles and Salt Lake Railway Company in the states of California, Nevada and Utah. Such properties included the general railroad shops at Los Angeles, where the injury occurred. Such railroad properties, tracks and lines were devoted to the handling of both interstate and intrastate traffic. On February 1, 1919, said Burton was injured while repairing engine No. 3673 in said general shops.

This locomotive had been used for several months before being sent to the repair shop, for the purpose of hauling through freight trains across the division to which it was assigned, the western terminus of the division being in California and the eastern terminus in Nevada. It may also have hauled local and intrastate freight, at times, in the same division. On the nineteenth of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure. It was the intention to return it to the same service upon the completion of the

repairs. This repair work was not completed until shortly before February 25, 1919, when the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles, California, to San Pedro, California, and on the following day returned to Los Angeles with a similar train, a portion of the train in each instance being interstate and other portions being intrastate. This trip to San Pedro was a part of the process of "breaking in" after the locomotive had undergone extensive repairs. After this run to San Pedro, the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run, where it has been used ever since.

The only question presented before the District Court of Appeal of California, and the only question here raised, is whether there was such an employment of Burton in interstate commerce at the time of his injury, as to remove the case from the jurisdiction of the Industrial Accident Commission and the protection of the California Workmen's Compensation, Insurance and Safety Act of 1917, and remit the claimant to the Federal Employers' Liability Act for his sole relief.

The record is free from dispute as to the facts. The legal conclusions to be drawn from those facts is all that was before the District Court of Appeal of California or that is involved in this petition for *certiorari*.

III.

Petitioner, Industrial Accident Commission was created, and now exists, under and by virtue of the Workmen's Compensation, Insurance and Safety Act of the State of California, approved May 26, 1913 (chapter 176, California Statutes 1913). Such Commission is empowered, among other duties, to determine all controversies arising between employers and their employees under the said Workmen's Compensation, Insurance and Safety Act, together with all later amendments, reenactments or supplementary workmen's compensation legislation. Said Commission is further vested by the said statute, with power and authority to appear by its own counsel in all proceedings in review of its decisions or affecting its jurisdiction

IV.

On the third day of July, 1919, said O. J. Burton filed with said Industrial Accident Commission of the State of California, a written application for adjustment of claim under the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, of California (chapter 586, California Laws 1917). On the eleventh day of July, 1919, said Walker D. Hines, as Director General of Railroads, United States Railroad Administration, filed his answer in said proceeding, claiming among other things, that said injury fell within the scope of the Federal Employers' Liability Act, and therefore, was without the jurisdic-

tion of said Commission. A hearing was had and testimony taken by said Commission on July 22, 1919. On December 17, 1919, said Industrial Accident Commission entered its findings and award awarding said O. J. Burton compensation benefits against said Walker D. Hines under said California statute. On January 2, 1920, said Walker D. Hines petitioned said Industrial Accident Commission for a rehearing, which petition was denied on January 22, 1920. On February 20, 1920, said Walker D. Hines filed his petition with the District Court of Appeal of the State of California, Second Appellate District, Division Two, for a writ of *certiorari* or review, to inquire into the lawfulness of said award of the Industrial Accident Commission of the State of California. Said Court granted a writ of *certiorari* or review on February 26, 1920. Thereafter proceedings were had before said court, briefs filed, and the matter submitted for decision.

On June 22, 1920, respondent John Barton Payne, as Agent under section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Co.), was substituted, upon stipulation, by order of said District Court of Appeal, as petitioner in said proceeding then pending before it, in the place of said Walker D. Hines, Director General of Railroads, United States Railroad Administration.

On November 26, 1920, said court entered its order and judgment annulling the award of said Industrial Accident Commission upon the ground that the injury sustained by O. J. Burton came within the

provisions of the Federal Employers' Liability Act and hence was not subject to the provisions of the California Workmen's Compensation Act. On December 16, 1920, a petition for rehearing was filed by said Industrial Accident Commission with said District Court of Appeal, which was denied on December 24, 1920. On January 3, 1921, a petition for hearing in the Supreme Court of California after final decision by the District Court of Appeal, was filed by counsel for the Industrial Accident Commission and denied by said court by a four to three vote on January 24, 1921.

V.

The District Court of Appeal of the State of California is created by Article VI of the constitution of the State of California, next to the highest court of California, and has original jurisdiction to issue writs of *certiorari* or review. No appeal lies from the District Court of Appeal to the Supreme Court, but the Supreme Court may order any matter pending before a District Court of Appeal to be transferred to it for hearing and decision, before decision of the District Court of Appeal, or within thirty days after the decision of the District Court of Appeal becomes final. Petitioners applied for the Supreme Court of California for such hearing and determination of this proceeding after the decision of the District Court of Appeal had become final, and within the time provided by law for such petition, and said petition was

denied by the Supreme Court by a vote of four to three, without opinion. Petitioners have had at no time any other recourse to the Supreme Court of California than said petition for hearing, and have had no hearing before the Supreme Court of the State upon this matter. That therefore the decision of the District Court of Appeal constitutes a decision of the highest court in which decision could be had. (See *Terry* vs. *Southern Pacific Co.,* 176 Cal. 584, 169 Pac. 354, dismissed in 249 U. S. 592) where it was held that said District Court of Appeal was the highest court in which decision could be had, in a case similar to the present.)

VI.

That said District Court of Appeal by its final judgment in this proceeding, erred in determining and holding that petitioner O. J. Burton was employed and engaged in interstate commerce at the time of his injury, and erred in holding that the California Workmen's Compensation, Insurance and Safety Act of 1917 was divested of application in the premises by reason of the claim that said Burton was remitted to the provisions of the Federal Employers' Liability Act, and erred in annulling the award of the Industrial Accident Commission of the State of California upon said ground.

VII.

REASONS WHY IT IS RESPECTFULLY SUBMITTED THAT CERTIORARI SHOULD BE GRANTED.

1. The decision of the District Court of Appeal is opposed to the decisions of this court in *Minneapolis & St. L. R. Co.* vs. *Winters,* 242 U. S. 353, and *B. & O. R. Co.* vs. *Branson,* 242 U. S. 623, reversing same title, 128 Maryland 678, 98 Atl. 225, and is also opposed to the recent decision of the Supreme Court of California in *John Barton Payne* vs. *Industrial Accident Commission of the State of California* (Brizzolara) Cal., 192 Pac. 859, in which a petition for *certiorari* was denied by this court on January 17, 1921.

2. The employee in the present case was injured while making repairs in a repair shop upon a road engine which had been withdrawn from service for several months for extensive repairs and alterations, and for the installation of certain new equipment. A locomotive, regardless of the character of its service while in use, is not an instrumentality of interstate commerce while out of service and commission for extended repairs or alterations, and such repairs do not come under the Federal Employers' Liability Act.

3. The employee in the present case was injured while repairing a locomotive, which, we claim, was used while in prior service both for interstate and intrastate commerce (see supporting brief, pp. 43-52), and at the time of the repairs was out of service and commission for an extended period. Repairs to such engine in a repair shop undoubtedly are gov-

erned by the state law under the authorities cited in paragraph 1, above.

4. At the time of the injury, Burton was engaged in extensive overhauling of such engine, including the installation of a superheating system, which makes the case analogous to one of rebuilding or new construction of railroad equipment, which is held by this court in *Raymond* vs. *C. M. & St. P. R. Co.*, 243 U. S. 43, to be governed by the state law.

VIII.

Your petitioner is advised, and he believes, that said judgment of the District Court of Appeal of the State of California in said case, is erroneous for the reasons above stated, and that this honorable court should require the said case to be certified to it for its review and determination in conformity with the provisions of section 237 of the Judicial Code of the United States, as amended by an act of September 8, 1916 (chapter 448, 39 Stat. 726).

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the District Court of Appeal of the State of California, Second Appellate District, Division Two, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said District Court of Appeal in the said case, entitled, *John Barton Payne, as Agent under Section 206, Transportation Act, 1920,* vs. *Industrial Accident Commission of the State of California and O. J. Burton,* Civ. No.

3296, to the end that the said case may be reviewed and determined by this court as provided by section 237, as amended by the Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate, and in conformity with said provision of the Judicial Code, and that said judgment of the said District Court of Appeal in the said case, and every part thereof, may be reversed by this honorable court, and that petitioners may recover their costs.

WARREN H. PILLSBURY,
Attorney for Petitioners.

State of California,
City and County of San Francisco. } ss.

Warren H. Pillsbury, being first duly sworn, deposes and says:

That I am an attorney and counselor of the Supreme Court of the United States. I am the attorney for the petitioners named in the foregoing petition for a writ of *certiorari*. The allegations of said petition are true as I verily believe. The points raised herein are, in my opinion, meritorious. Said petition is not filed for the purpose of delay.

(Signed) WARREN H. PILLSBURY.

Subscribed and sworn to before me this fifth day of February, 1921.

(SEAL)

C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California.

JUDGMENT TO BE REVIEWED AND OPINION THEREON.

CIVIL No. 3296.

SECOND APPELLATE DISTRICT

DIVISION TWO.

NOVEMBER 26, 1920.

JOHN BARTON PAYNE, as Agent under Section 206, Subdivision (b) of the Transportation Act, 1920 (substituted for Walker D. Hines), *Petitioner,* vs. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and O. J. BURTON, *Respondents.*

[1] WORKMEN'S COMPENSATION ACT—INJURY TO WORKMAN IN RAILROAD REPAIR SHOPS—ENGINE ENGAGED IN INTERSTATE COMMERCE—LACK OF JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—An employee engaged in repairing an engine in the general shops of the railroad company in this state, which engine had been used several months exclusively in interstate commerce, and which had been placed in the shops for general overhauling, whereupon it was the intention to return it to its regular service, and which was in fact so returned, is engaged in work so intimately connected with interstate commerce as practically to be a part of it, and the Industrial Accident Commission has no jurisdiction to make an award of compensation for injuries to such employee received while tapping the boiler of the engine.

APPLICATION FOR CERTIORARI TO REVIEW AN ORDER OF THE INDUSTRIAL ACCIDENT COMMISSION AWARDING COMPENSATION FOR INJURIES. AWARD ANNULLED.

ON PETITION FOR WRIT OF REVIEW.

For Petitioner—Fred E. Pettit, Jr., E. E. Bennett.

For Respondents—A. E. Graupner; Warren H. Pillsbury, of Counsel.

This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, director general of railroads, operating the Los Angeles and Salt Lake railroad.

On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the nineteenth of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919,

but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of "breaking in" after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

The sole question presented for our consideration is: Was the engine, at the time of the accident, engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act (35 U. S. Stats., 65)?

The answer to this simple proposition is rendered difficult by the apparent conflict of decisions of the various courts, federal and state, which have been called upon to apply the law to the facts in issue in particular cases. It is complicated by reason of the

fact that no fixed rule has been established by the Supreme Court of the United States for the application of the statute. It has held that each case must be decided in the light of the particular facts with a view to determining whether, at the time of the injury, the employer is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof. (*New York C. & H. R. Co.* vs. *Carr,* 238 U. S. 260.) Where the employer is engaged in both intrastate and interstate commerce, and the instrumentalities are used indiscriminately in both, the line of demarkation between the two classes of business is exceedingly difficult to trace. A resume of some of the decisions will serve to illustrate this point.

In *Louisville & Nashville R. Co.* vs. *Parker,* 242 U. S. 13, the employee was engaged in switching a car not moving in interstate commerce from one track to another, for the purpose of reaching and moving an interstate car; and it was held that he was engaged in interstate commerce. The court says: "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, and doing the act for the purpose of furthering the later work."

New York C. R. Co. vs. *Carr, supra,* was a case where two cars carrying interstate freight were uncoupled from an interstate train and backed into a siding, where the employee was injured. We quote from the decision: "The matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an

engine for an interstate trip, he is entitled to the benefit of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In the case of *Erie R. Co.* vs. *Winfield,* 244 U. S. 170, an employee was in charge of a switch engine which was used in switching cars about in the yard, especially to and from a transfer station, some cars containing interstate freight, others intrastate, and still others carrying both classes. After completing his day's work, he put his engine away and started to leave the yard. While crossing a track on his way out, he was struck by an engine and killed. It was held that, as his work was particularly interstate, and his leaving the yard was a necessary incident to his employment, he was at the time engaged in interstate commerce within the purview of the federal act.

New York C. R. Co. vs. *Porter,* 249 U. S. 168, determined that a workman engaged in removing snow from tracks used for the transportation of interstate and intrastate commerce was entitled to compensation under the federal law.

In *Philadelphia B. & W. R. Co.* vs. *Smith,* 250 U. S. 101, the employee was the cook of a construction crew which was employed in repairing bridges at different places along the line. The court stated that as he was actually assisting the bridge carpenters by keeping their bed and board close to their place of work, he was engaged in interstate commerce.

Pederson vs. *Delaware L. & W. R. Co.,* 229 U. S. 146, decided that an employee who was carrying bolts to be used in repairing an interstate railroad, and was injured by an interstate train while performing that duty, was within the terms of the federal statute.

Shanks vs. *Delaware L. & W. R. Co.*, 239 U. S. 556, enunciates the principle that a workman employed in removing and installing fixtures in a machine shop which is conducted for repairing locomotives used in both interstate and intrastate transportation is not entitled to the benefit of the federal act. The court in its opinion says: "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation."

In the case of *Chicago, B. & Q. R. Co.* vs. *Harrington*, 241 U. S. 177, the workman was employed with a crew in switching cars of coal to sheds, where it was placed in chutes, thence to be used to supply coal to engines engaged in both classes of transportation. The court held that he was not in interstate commerce, stating that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

The above citations will suffice to indicate the subtle distinctions which have been drawn by the Supreme Court of the United States in interpreting and applying the Federal Employers' Liability Act.

Coming now to the decisions of our own supreme court construing these authorities, we encounter a direct conflict which adds to the difficulty of reaching a satisfactory solution of the problem.

In the case of *Southern Pacific Co.* vs. *Pillsbury*, 170 Cal. 782, the Industrial Accident Commission of California had assumed jurisdiction, under substantially the following facts: A workman named Ruth was repairing a switch engine which had been withdrawn from service in the yard at Roseville Junction,

California, where some seventy per cent of the switching was interstate commerce work. While thus engaged, Ruth received injuries resulting in his death. The accident occurred during the time the engine was in the roundhouse undergoing repairs, and three days before it was restored to service. Our supreme court annulled the award, after discussing the decisions of the federal courts, some of which we have cited. On May 21, 1917, without filing an opinion, the Supreme Court of the United States denied a petition for a writ of *certiorari* whereby it was sought to review the decision of the state court.

On January 8, 1917, the Supreme Court of the United States rendered an opinion in the case of *Minneapolis & St. Louis R. Co.* vs. *Winters,* 242 U. S. 353, from which we quote: "The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both interstate and intrastate commerce, and it was so used after plaintiff's injury.' The last time before the injury was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to any kind of traffic, and it does not appear that *this engine was destined especially to anything more definite than such business as it might be* needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as*

appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depends upon its employment at the time, and not upon *remote probabilities* or upon *accidental later events.*" (Italics ours.)

On the authority of this Winters case, our supreme court, in *Hines* vs. *Industrial Acc. Com.,* 60 Cal. Dec. 365, filed October 4, 1920, affirmed an award to one Brizzolara, under circumstances somewhat similar to those in the Ruth case, *supra.* The finding of the commission in the Brizzolara case was as follows: "That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole." After quoting from the decisions of the United States Supreme Court, the opinion proceeds to state that the ruling in the Ruth case is at variance with the holding in the Winters case, and that the Ruth case, therefore, can not be considered as controlling, notwithstanding that the Ruth case was affirmed by the United States Supreme Court some four months after the Winters case was decided.

Some of the other adjudications of our supreme court are illuminating upon this intricate problem. It has been held that a watchman at a railroad crossing used for both interstate and intrastate traffic is engaged in interstate business while employed in keeping the track clear of obstructions in order to

facilitate the passage of interstate trains. (*Southern Pacific Co.* vs. *Industrial Acc. Com.* [Rolfe case], 174 Cal. 8; *Southern Pacific Co.* vs. *Industrial Acc. Com.* [Smith case], 174 Cal. 16.) An electric lineman employed in the removal of an overhead telephone wire which had fallen on the trolley wire used by a railroad for furnishing electric power for the operation of cars of the railroad's interstate and intrastate passenger system, was engaged in interstate commerce, as he was then engaged directly in removing an obstruction to the operation of an instrumentality in actual use for purposes of such commerce. (*Southern Pacific Co.* vs. *Industrial Acc. Com.* [Covell case], 174 Cal. 19.)

In the case of *Southern Pacific Co.* vs. *Industrial Acc. Com.*, 178 Cal. 20, one Butler was killed by an electric shock received while he was wiping insulators on the main power line of an interstate and intrastate system, between the power house and substations. The electrical energy was generated at this power house and conveyed in an alternating current of high voltage to the substations, there converted and transformed to a direct current of reduced voltage, thence passed to the trolley wires, and from there to the motors on the cars. Our supreme court applied the principle of the Harrington case, *supra*, and decided that the work being done by Butler was analogous to the situation of an employee loading coal chutes for the supply of interstate engines, and held that Butler's employment was too remote from interstate commerce to bring him within the federal statute. This action was reversed by the Supreme Court of the United States (40 Sup. Ct. Rep. 130), the court saying: "Generally, when applicability of the Federal Employers' Liability Act is uncertain,

the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it."

The cases which most closely parallel the one we have under consideration are found in the decisions of the circuit courts of appeals; and though they are not expressions of the court of last resort, nevertheless they may guide the action of the state courts in determining the applicability of the federal statute.

Law vs. *Illinois Cent. R. Co.*, 208 Fed. 869, was decided by the circuit court of appeals of the sixth circuit. A boilermaker's helper was injured in the shops of the railroad company at Memphis, Tenn., while assisting the boilermaker in repairing a freight engine regularly used in interstate commerce. The engine was in the shop for what is called "roundhouse overhauling," and had been dismantled at least twenty-one days before the accident. Up to the time it was taken to the shop it had been regularly used in interstate commerce, was destined to return thereto on completion of the repairs, and did so return the day following the accident. In the opinion holding

the federal act applicable to the facts, the court propounds the following pertinent interrogatories: "Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in the roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?" Further quoting from the opinion: "As held in the Pederson case, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in proper state of repair while thus used is so clearly related to such commerce as to be in practice and in legal contemplation a part of it."

In *Northern Pacific R. Co.* vs. *Maerkl,* 198 Fed. 1, the circuit court of appeals of the ninth circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used indiscriminately in intrastate and interstate commerce, and intended again to be so used when repaired, was one of the instruments of interstate commerce.

Some general statements in the opinion in the Brizzolara case, *supra,* might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra,* upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend

upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, "the purpose controls, and the business is interstate." Its future use was not dependent upon "remote probabilities or accidental later events," but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

[1] In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

WELLER, J.

We concur:

FINLAYSON, P. J.

THOMAS, J.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No._____.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,
Petitioners,

vs.

JOHN BARTON PAYNE, AS AGENT UNDER SECTION 206, TRANSPORTATION ACT, 1920 (LOS ANGELES AND SALT LAKE RAILWAY COMPANY),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This case involves the determination of the respective application of the Federal Employers' Liability Act of April 22, 1908, chapter 149, 35 Stat. 65 (amended in respects not material here on April 5, 1910), or of the Workmen's Compensation Act of California (chapter 586, Cal. Stats. 1917) to an injury sustained by petitioner O. J. Burton on February 1, 1919, at Los Angeles, California, while in the course of his employment in the general repair shops of the Los Angeles and Salt Lake Railway Company.

Application was originally made by Burton under the California Workmen's Compensation Act before the California Industrial Accident Commission. This body applied the California law to the injury. On review by *certiorari* of its decision by the District Court of Appeal of California, Second Appellate District, Division Two, the appellate court annulled the allowance of workmen's compensation benefits upon the ground that the claim was within the Federal Employers' Liability Act. This is the decision here sought to be reviewed by this court.

The facts are stated in detail in the petition for *certiorari*. The evidence is free from dispute, and only the legal conclusions to be drawn from the undisputed facts are in issue. In brief, the claimant below, O. J. Burton, was injured in the general repair shops of the employing railroad while repairing a locomotive which was out of service at the time, and dismantled, undergoing extensive repairs and alterations and the addition of new equipment. The nature of the use of this engine while in service is discussed in the second division following, of this brief.

STATEMENT OF PETITIONERS' POSITION AND CONTENTIONS.

Petitioners claim that this case is governed by the decisions of this court in *Minneapolis & St. L. R. Co.* vs. *Winters*, 242 U. S. 353, and *B. & O. R. Co.* vs. *Branson*, 242 U. S. 623, and by the decision of the Supreme Court of California in *Payne* vs. *Industrial Accident Commission* (Brizzolara) --- Cal. ---, 192

Pac. 859, in which a petition for *certiorari* filed by counsel for the railroad was denied by this court on January 17th of this year.

(*a*) The foregoing authorities hold, we contend, that where a locomotive, *without regard to the nature of its service while in use,* is withdrawn from service for repairs, so that it is wholly out of service and commission, and not assisting in the movement of any kind of commerce, an injury sustained by men in repair shops in repairing such locomotive does not fall within the provisions of the federal act. The present case is upon its facts, wholly within this rule.

(*b*) At the least, the foregoing cases undoubtedly hold that where an engine *is engaged in both interstate and intrastate commerce while in service,* and is taken wholly out of service and commission for repairs, so that it is not engaged in any kind of commerce while being so repaired, injuries sustained by men in repair shops in repairing such engine, do not fall within the provisions of the federal act.

The trial court below (Industrial Accident Commission) and the appellate court (District Court of Appeal) have reached opposite results in drawing their conclusions of law upon the undisputed facts, as to whether the engine in the present case was "permanently and exclusively devoted to interstate commerce" while in service, or engaged in both kinds of commerce. If this question be material, we claim that this case, upon the undisputed facts and the findings below, is within the rule here stated.

(*c*) We urge this court to announce a clear-cut rule for determining jurisdiction in cases of injuries to railroad shopmen, working upon rolling stock withdrawn from service. Railroad shopmen form a distinct group of railroad employees as to jurisdictional requirements, and should be considered, to some extent, with reference to their own necessities and position. Without such clear-cut rule, inferior courts can not, with assurance, determine which law to apply in litigated cases, and much hardship and unnecessary litigation results. We contend that the only practicable test in repair shop cases is that dependent upon whether the engine or car is withdrawn from service, as distinguished from being merely interrupted for repairs during the course of an interstate haul, to go on after the repairs. Any distinction based upon the character of use of the engine or car while in use, is contrary to the purpose of the Federal Employers' Liability Act, and incapable of practical application to injuries sustained by repair shopmen, to whom all rolling stock in the repair shops is alike, as to jurisdiction.

ARGUMENT.

I.

WHERE A LOCOMOTIVE, WITHOUT REGARD TO THE NATURE OF ITS SERVICE WHILE IN USE, IS WITHDRAWN FROM SERVICE FOR EXTENDED REPAIRS, SO THAT IT IS WHOLLY OUT OF SERVICE AND COMMISSION AND NOT ASSISTING IN THE MOVEMENT OF ANY KIND OF COMMERCE AT THE TIME OF SUCH REPAIRS, AN INJURY SUSTAINED BY A REPAIR SHOP WORKMAN WHILE REPAIRING SUCH LOCOMOTIVE, DOES NOT FALL WITHIN THE PROVISIONS OF THE FEDERAL ACT. *MINNEAPOLIS & ST. L. R. O.* vs. *WINTERS*, 242 U. S. 353; *B. & O. R. CO.* vs. *BRANSON*, 242 U. S. 623; *PAYNE* vs. *INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA* (BRIZZOLARA), ——— Cal. ———, 192 PAC. 859, *CERTIORARI* DENIED BY THIS COURT JANUARY 17, 1921.

The facts as set forth in the petition, and as set out in more detail in the next subdivision of this brief, show clearly that the engine upon which Burton was working was, at the time of his injury, withdrawn from service and out of commission. It was in the repair shop from December 19, 1918, to March 4, 1919, except for one short trial trip on February 25 and 26, 1919. The injury occurred on February 1, 1919. From December 19, 1918, to February 25, 1919, the engine moved no commerce, interstate or otherwise, and was not a part of the equipment in use for the movement of interstate or local commerce. If, therefore, the rule stated in the caption is a correct deduction from the three cases mentioned, the decision of the District Court of Appeal was erroneous and should be reversed.

These three cases show, in our belief, that the character of service of a locomotive while in use, is in no sense a part of the test of jurisdiction over injuries occurring while it is out of commission for extended repairs.

In the first case cited, the *Winters* case (*Minneapolis & St. L. R. Co.* vs. *Winters*, 242 U. S. 353), this court used language, as quoted below, which supports this view. It is true that certain other language used in the opinion also leans toward the opposing view, that the character of use of the locomotive while in service, might be a factor. We are left somewhat in doubt as to which language this court will now follow. As the present case is one of many which will come up hereafter, we urge this court to give a statement of its view for the guidance of lower tribunals in cases like the present.

We quote the following from the *Winters* case, italicizing the portions of the opinion which substantiate our contention:

"The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th when it pulled a freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train

out from the same place. That is all that we have, and is not sufficient to bring the case under the act. *This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic* and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. *It was not interrupted in an interstate haul to be repaired and go on.* It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time,* not upon remote probabilities or upon accidental later events. Judgment affirmed." (Italics ours.)

Applying the italicized portions to the present case, the engine here was not "permanently devoted to any kind of traffic." An irrevocable dedication of an engine to a particular kind of traffic can not be, and is not, made. An engine is not like a roadbed in this respect. It is not shown that this engine was of such a type of construction that it could be usable only in interstate commerce. In the absence of such showing, it was physically capable of being shifted from one assignment to another, from through to local freight, or from one division to another, as the exigencies of the business of the road might require.

Similarly, it was not "interrupted in an interstate haul to be repaired and go on."

Similarly, "its next work, so far as appears, might be interstate or confined to one state as it should happen." Its next trip after leaving the repair shop on February 25 was in fact confined to California, during which it hauled two trains containing both interstate and intrastate cars.

Furthermore, "at the moment, it was not engaged in either. Its character as an instrumentality of commerce depended upon this employment *at the time* * * *." *"At the time"* it was in the shop.

The *Winters* case, therefore, wholly governs the present case.

In the second case cited, the *Branson* case (*B. & O. R. Co.* vs. *Branson,* 242 U. S. 623), reversing same title, 128 Md. 678, 98 Atl. 225, a painter was employed at a railroad roundhouse to paint engines and cars, which were necessarily out of service and commission while being painted. He contracted a metallic poisoning from the paints used, and filed suit for damages under the Federal Employers' Liability Act. The Supreme Court of Maryland, in 128 Md. 678, 98 Atl. 225, held the case to be within the federal act, in that the engines and cars, while in use, were employed in the interstate commerce business of the railroad. This conclusion was reversed by this court in a memorandum opinion, upon the authority of *Del. L. & W. R. R. Co.* vs. *Yurkonis,* 238 U. S. 439; *C. B. & Q. R. R. Co.* vs. *Harrington,* 241 U. S. 177; *Shanks* vs. *Del. L. & W. R. R. Co.,* 239 U. S. 556; and *Minneapolis & St. L. R. Co.* vs. *Winters,* 242 U. S. 353.

The painting of locomotives in a roundhouse seems undistinguishable, for jurisdictional purposes, from the making of repairs upon the same locomotive when similarly taken out of service.

Not only is the *Branson* case, in point upon its facts, but the authorities cited by this court in its memorandum decision in that case, present an additional ground for reversing the decision below in the present matter. These cases cited are all what may be termed "remoteness cases." Only one case there cited, the *Winters* case, involves repairs to rolling stock. All are cases in which the service performed at the time of the injury was held remote, or too far removed from the interstate business of the railroad, to come under the federal act.

For instance, in the *Yurkonis* case, the mining of coal in a railroad owned mine, the coal to be used subsequently for firing engines engaged in interstate and intrastate commerce, was held remote from the actual transportation of interstate commerce. In the *Harrington* case, the shifting of coal cars containing railroad owned coal, and the unloading of such coal into bunkers from which the coal was to be supplied to engines engaged in moving both kinds of commerce, was held remote from the interstate commerce business of the employer. In the *Shanks* case, the repair of machinery in a railroad shop, which machinery was in turn used in the repair of engines and cars used in interstate commerce business of the railroad, was held remote. And in the *Winters* case, *supra*, cited in the opinion in the *Branson* case, *supra*,

the repair of a road engine used in interstate commerce was held remote.

One of the grounds of the decision of this court in the *Branson* case, *supra,* must therefore have been that the painting of engines and cars used in the interstate commerce business of the railroad, is remote to the actual movement of interstate commerce, such engines or cars being out of service.

Viewed either as a remoteness case or as a repair case, the present case is no closer to the actual movement of commodities in interstate commerce than the cases cited by this court in its memorandum opinion in the *Branson* case, or in the *Branson* and *Winters* cases themselves. Nor did the service rendered by Burton in the present case facilitate to any greater degree the interstate commerce business of the railroad than the service rendered by Branson or by Winters.

Another test may be applied to determine remoteness to interstate commerce. In *Hudson & M. R. Co.* vs. *Iorio* (U. S. Circuit Court of Appeal) 239 Fed. 855, a railroad employee was injured while piling rails for storage to stay until needed for track laying. The Circuit Court of Appeal there applied the test of whether interstate commerce was "going on without present assistance from Iorio," in determining whether his service was so closely connected with interstate commerce as to be a part thereof. It was held that his claim did not come under the federal act. Applying the test of the Iorio case to the present case, the interstate commerce business of the Los

Angeles & Salt Lake Railway Company was being carried on at the time of Burton's injury "without present assistance from Burton."

Going back to the fundamental basis upon which all of the authorities cited depend, the language of the Federal Employers' Liability Act itself, the same conclusion follows. The federal act, by its express terms, applies only to injuries sustained by an employee of a railroad engaged in interstate commerce, "while he is employed by such carrier in such commerce." This clause has been construed to mean, service in interstate commerce *at the moment of the injury, Illinois Central R. Co.* vs. *Behrens,* 233 U. S. 473. Applying the statutory test itself to the present case, the service of Burton at the time of his injury is remote to the actual movement of the interstate commerce business of the railroad. *Such interstate commerce was moving without present assistance from Burton. No interstate commerce was waiting upon Burton's actions for forwarding.*

Taking up the third authority upon which we rely, *Payne* vs. *Industrial Accident Commission,* not yet officially reported, 192 Pac. 859, in which *petition for certiorari filed by counsel for the railroad was denied by this court on January 17th of this year,* we contend that this case supports the rule here contended for. The California court said in this connection:

> "Applying these principles to the facts herein, we think that, at the time Brizzolara received the injury which caused his death he was not engaged in interstate commerce. The engine which he was

repairing was not used exclusively in such commerce. Indeed, as was said in the Winters case, '*an engine as such is not permanently devoted to any kind of traffic*, and it does not appear that this engine was destined to anything more definite than such business as it might be needed for.' *It had been withdrawn from all traffic.* To paraphrase the language of the Harrington case, *it is not important whether the engine had previously been engaged in interstate commerce or that it was contemplated that it would be so engaged after this immediate duty had been performed.* And this further excerpt from the opinion in the Winters case is pertinent: 'Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.' We quote from *Chicago R. I. and P. R. Co.* vs. *Cronin*, 176 Pac. 919 (Okla.): '*We can not agree with the plaintiff in error that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was "dead"; undergoing the repairs necessary to placing it in commerce.*'" (Italics ours.)

ANSWER TO ATTEMPTS BELOW TO DISTINGUISH THE PRESENT CASE.

1. In the briefs and decision below in the present case, one attempted ground of distinction between the present case and the three principal cases cited above, was that the engine in the present case was claimed to have been permanently and exclusively devoted to interstate commerce while in service, while in the three cases cited, the engine was used for mov-

ing both interstate and intrastate commerce while in service. In the next main division of this brief we will show that the engine in the present case was not wholly employed in interstate commerce while in service. As to its legal effect, we here claim that it is immaterial whether the engine was or was not engaged exclusively in interstate commerce during its prior service. At the time of the injury sustained by Burton, the engine was not engaged in any kind of commerce.

"An engine as such is not permanently devoted to any kind of traffic * * *" (*Winters* case, *supra*). With the possible exception of an engine which is so constructed that it is incapable of being used in local commerce, which if it can exist, is not claimed to have been the case here, any engine is capable of assignment or transfer from one kind of service to another, as the business of the railroad may require. An *irrevocable* assignment to interstate commerce alone, is legally, and as a matter of fact, impossible. If the engine while in use was not *irrevocably* assigned to a particular service, it was not permanently so assigned.

Confusion has arisen upon this matter of "permanent and exclusive devotion to interstate commerce," because of a misunderstanding by inferior courts of the decision of this court in the Pedersen case (*Pedersen* vs. *Del. L. & W. R. Co.*, 229 U. S. 146). In that case, the first case involving repairs to bridges and roadbed to reach this court, reference was made in general terms, to repairs to *instrumen-*

talities permanently devoted to interstate commerce coming within the Federal Act. The court was here speaking of repairs to a railroad bridge, a portion of the immovable equipment of a railroad, similar in character to roadbed, tracks, etc. This decision was erroneously construed by inferior courts, including the Supreme Court of California in *Southern Pacific Co.* vs. *Pillsbury, et al.* 170 Cal. 782, 151 Pac. 277, to include repairs to engines. This misconstruction was cleared up by this court in the *Winters* and *Branson* cases, *supra,* by which it is definitely held that engines (movable equipment) even though used in the interstate business of the railroad, are not permanent instrumentalities of interstate commerce while out of service for repairs. "This is not like the matter of repairs upon a road permanently devoted to commerce among the States." (*Winters* case, *supra.*) The Supreme Court of California has so construed the *Winters* and *Branson* cases as overruling its decision in the case immediately above referred to in the Brizzolara case (*Payne* vs. *Industrial Accident Commission,* — Cal. —, 192 Pac. 859, *certiorari* denied by this court January 17, 1921). Hence, the mere fact that the past assignment of an engine may have been wholly or nearly wholly to interstate commerce, is immaterial. The engine is still a portion of the movable equipment of the railroad, susceptible of use in either kind of business, local or interstate, and of transfer from one such use to another, as the business of the railroad may require.

In addition, the following distinctions between immovable equipment, (roadbed, tracks, bridges, etc.) and movable equipment, (rolling stock) appear:

(1) Tracks, bridges, etc., are not ordinarily out of service during repairs, but are an existing and permanent instrumentality of interstate commerce at all times, whether under repairs or not, (at least every decision in which the jurisdictional question is discussed, is one in which the instrumentality remained in service during the repairs). An engine or car, on the other hand, is taken out of commission and service when undergoing extensive repairs, and is then even more out of service in interstate commerce than while carrying local commerce solely, in which latter case it is not within the federal act, *Illinois Central R. Co.* vs. *Behrens*, 233 U. S. 473. The dedication of a track to interstate commerce is, therefore, permanent, but that of rolling stock occasional only, and not at all when the object is not in use in transporting commerce.

(2) It is physically impossible to segregate portions of the track of an interstate carrier into interstate and local parts either temporally or geographically. Interstate, mixed, and local trains move over the whole track every day, and no particular stretch of track can be said to be solely in one kind of commerce at one time, or solely in another kind of commerce at another time. All engines, on the other hand, are capable of and do propel interstate commerce solely at some times, intrastate solely at others, and mixed trains at others. This court has recog-

nized such different character at different times of train crews and cars for the purposes of jurisdiction, depending upon the kind of commerce being transported at the moment, *Illinois Central R. Co.* vs. *Behrens, supra.*

2. A second suggested differentiation is that the engine in this case crossed a state line on its run from one end of the railroad division to the other. This appears as a salient fact in the case, but was not referred to by the lower court in its opinion, and is in our opinion, an immaterial circumstance.

The test of jurisdiction as to a train, is the character of the commodities of commerce carried by it, not the physical movement of the train itself. *Commerce* consists in the movement of *commodities.* An engine or a train need not cross a state line to be engaged in interstate commerce, the presence of passengers or commodities on the train enroute to points in another state being sufficient. An engine running without cars at the time it crosses the state line would not be engaged in interstate commerce, or in any kind of commerce.

For instance, the Knickerbocker Express runs daily from Chicago to New York. It is no less an instrumentality of interstate commerce when crossing from one side of Indiana to the other, than while crossing from Indiana to Ohio. It retains its same character throughout. And an express train running from New York City to Albany, wholly within the state of New York, is almost always an instrumentality of interstate commerce, because almost

always it will carry one or more passengers traveling on interstate tickets, or one or more pieces of baggage, express or mail, which are being carried in the course of an interstate movement.

Hence, the crossing of the state line by the engine on its regular run in the present case, is of no jurisdictional significance.

3. The court below relied mainly in support of the decision here complained of, upon cases which have been overruled by this court and which do not sustain its decision.

The court below cited as the main authorities for its decision, the cases of *Law* vs. *Illinois Central R. Co.*, 208 Fed. 869, and *Northern Pacific R. Co.* vs. *Maerkl*, 198 Fed. 1. These are the only cases cited by the court below which involve repairs to rolling stock, and hence the only cases in point upon their facts, to the present case. Both the cases cited were decided by inferior courts prior to the decision of this court in the *Winters* and *Branson* cases, *supra*. They are inconsistent with and overruled by the latter cases, and not authority, leaving the decision below in the present case without the support of any authority closely in point upon the facts.

II.

AT THE LEAST, THE *WINTERS*, *BRANSON*, AND *BRIZZOLARA* CASES, *SUPRA*, STAND FOR THE PROPOSITION THAT THE MAKING OF REPAIRS TO AN ENGINE, ENGAGED WHILE IN SERVICE IN BOTH INTERSTATE AND INTRASTATE COMMERCE, SUCH REPAIRS BEING MADE WHILE THE ENGINE IS OUT OF COMMISSION AND NOT ENGAGED IN ANY KIND OF COMMERCE, IS NOT WITHIN THE FEDERAL ACT. IT IS OUR CONTENTION THAT THE PRESENT CASE IS SQUARELY WITHIN THIS RULE.

This brings us to a consideration of the findings and conclusions of fact and law below, as to the nature of the services performed by the engine while in service. We appreciate that this court will not review questions of fact, but relies upon the determination below for the facts. While the District Court of Appeal appears to have drawn conclusions somewhat at variance with those drawn by the *nisi prius* body, it is clear that the facts are not in dispute. We contend that upon the state of the record, the findings below which this court will accept, are in accordance with our position.

The findings of fact of the Industrial Accident Commission, the court of first instance in the present case, are, as far as relevant to the jurisdictional issue, as follows:

"1. That O. J. Burton, hereinafter called the employee, the applicant herein, was injured on the 1st day of February, 1919, at Los Angeles, California, while in the employment of defendant Walker D. Hines, as Director General of Rail-

roads, United States Railroad Administration, hereinafter called the employer, as a machinist;

2. That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, and happened in the following manner: While tapping the boiler of an engine, a piece of steel lodged in his left eye, blown by the exhaust from a compressed air holder near him, where other men were at work;

9. That the engine upon which he was at work had been theretofore used in interstate commerce, but during the period from the 19th day of December, 1918, to the 21st day of February, 1919, said engine was withdrawn from any and all service for repairs, was not then an instrument of or engaged in any commerce, and the employee was not engaged in interstate commerce, and both employer and employee were subject to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of this Commission."

The rule is well established that findings of fact may be limited to the ultimate facts, omitting recitals of subordinate evidentiary facts. Where the findings state the ultimate facts only, it is also a well established rule that all evidentiary or subordinate facts are to be taken as found, which are necessary to support the decision arrived at. If, therefore, it should be necessary to support its decision to show that the locomotive in question, while in service, was used i

both kinds of commerce, the ultimate facts found by the *nisi prius* tribunal must be taken to include such finding.

Section 67 (*c*) of the California Workmen's Compensation Act (chapter 586, Cal. Stats. 1917) reads in part as follows:

> "(*c*) The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the court shall enter judgment either affirming or setting aside the order, decision or award or may remand the case for further proceedings before the commission."

The rule is also established in California practice, construing section 67 (*c*) above, that a finding which is without the support of substantial evidence, is a mere conclusion of law, and therefore subject to review by the appellate courts.

> *Employers Liability Assurance Corp.* vs. *Industrial Accident Commission,* 170 Cal. 800 151, Pac. 423.

In the present case, the District Court of Appeal did not purport to review or overrule the Commission's findings of fact or to set aside such findings as being without the support of evidence. The judgment of the court goes only to the annulment of

the award but does not overturn the findings of fact. The only comments made by the District Court of Appeal upon the findings of the Commission are contained in the restatement of the facts made by the court, the following being quoted from its opinion.

> "On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake Railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. *This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad.* On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a

portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of 'breaking in' after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

* * * * * * *

Some general statements in the opinion in the Brizzolara case, *supra* might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence.

It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was *permanently devoted to interstate commerce,* was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, supra, 'the purpose controls, and the business is interstate.' Its future use was not dependent upon 'remote probabilities or accidental later events,' but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

(1) In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled."

The evidentiary facts being uncontroverted, may be here summarized, not to contradict the findings but to supplement them, as the District Court of Appeal did. The record shows that the engine in question, while in service, was regularly assigned to and used upon the through freight service of a railroad division, of which the eastern terminal was in

the state of Nevada and the western terminal in the State of California. It regularly hauled through freight trains from one end to the other of this division. There was also a local freight train run upon the same division, which, while going west, picked up cars at way stations which were bound to points beyond the division, and hauled them to the end of the division, at which point they were put into the next through freight train. Necessarily, such local freight on its west bound trip would pick up cars at way stations in California which were consigned to destinations in California, and hence were in intrastate service. The engine upon which Burton was injured may have been used at times on this local service (Rec. p. 114). Furthermore, this engine on February 25, 1919, when released from the shops temporarily, hauled freight from Los Angeles, California, to San Pedro, California, containing both interstate and intrastate cars, and on the next day made a return trip between the same points, similarly hauling both kinds of commerce. When finally released from the shops on March 4th, the engine started east from Los Angeles with a through freight. The record fails to show whether said train consisted solely of interstate cars or included local cars bound for points outside the first division.

The foregoing facts constitute all the facts in the record. They should be considered in connection with the rule of law, that where a railroad is sued under the state law and seeks to evade the jurisdiction of the tribunal by pleading the federal act, the burden of

proof is upon the railroad to establish this inclusion under the federal act. If the railroad fails to establish to the reasonable satisfaction of the trier of the facts, any material fact necessary to its defense, the findings should properly be against the railroad.

Terry vs. *Southern Pacific Co.,* 34 Cal. App. 330, 169 Pac. 86; dismissed for want of jurisdiction 249 U. S. 592.

Bradbury vs. *C. R. I. & P. Ry. Co.,* 149 Iowa 51, 128 N. W. 1;

Di Donato vs. *Phil. & R. Ry. Co.,* --- Pa. ---; 109 Atl. 627;

Ill. Cent. R. Co. vs. *Ind. Board,* 284 Ill. 267, 119 N. E. 920;

Atchison, T & S. F. Ry. Co. vs. *Ind. Comm.,* 290 Ill. 590; 125 N. E. 380; *certiorari* denied 40 S. Ct. 393;

Polk vs. *Phil. & R. Ry. Co.,* --- Pa. ---, 109 Atl. 627.

In the present case the railroad has failed to show that the engine was used solely and exclusively in interstate commerce, as it is a reasonable inference that the engine was used occasionally for both interstate and intrastate commerce.

The trier of the facts, having found impliedly that the engine was not used wholly in interstate commerce, and the undisputed facts being squarely in support of this finding, and the District Court of Appeal having failed to set aside those findings of fact or to intimate that said findings were not made in conformity with law, it is submitted that the official finding which this court should accept is the find-

ing that the engine was used in both kinds of commerce. At least this court should be at liberty to examine into the record to supplement the incomplete findings made below, as was done by the District Court of Appeal but with erroneous conclusions of law upon the undisputed facts.

The statements of the court below are, in the last analysis, conclusions of law and not findings of the facts. The mere fact that the District Court of Appeal restated all of the facts independently of the Commission's findings (the District court of Appeal having no authority under the law to substitute its own findings of fact for those of the Commission because of the provision of section 67*c* of the Workmen's Compensation Act quoted above), should not prevent this matter from being considered upon its merits.

Close scrutiny of the opinion below renders it doubtful that the court intended to draw any conclusions of fact contrary to the findings of fact of the Commission, express or implied. The court does not squarely state as a fact that the engine was used wholly and solely in interstate commerce throughout. It states merely that "this locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce * * *." This is substantially correct, and yet upon the facts stated above, does not warrant the conclusion that the engine was permanently and exclusively devoted to interstate commerce, if such a thing be possible. Reference to "several months" means an exclusive use for a short period only, which is not a permanent

dedication. And in the last paragraph of its opinion, the court states merely that "here the engine was permanently devoted to interstate commerce * * *." This is a mere conclusion of law, not a recital of the facts, and therefore subject to review by this court.

III.

WE URGE THIS COURT TO ANNOUNCE A CLEAR-CUT RULE FOR DETERMINING JURISDICTION IN CASES OF INJURIES TO RAILROAD SHOPMEN WORKING UPON ROLLING STOCK WITHDRAWN FROM SERVICE. RAILROAD SHOPMEN FORM A DISTINCT GROUP OF RAILROAD EMPLOYEES AS TO JURISDICTIONAL REQUIREMENTS, AND SHOULD BE CONSIDERED, TO SOME EXTENT, WITH REFERENCE TO THEIR OWN NECESSITIES AND POSITION WITHOUT SUCH CLEAR-CUT RULE, INFERIOR COURTS CAN NOT, WITH ASSURANCE, DETERMINE WHICH LAW TO APPLY IN LITIGATED CASES, AND MUCH HARDSHIP AND UNNECESSARY LITIGATION RESULTS WE CONTEND THAT THE ONLY PRACTICABLE TEST IN REPAIR SHOP CASES IS THAT DEPENDENT UPON WHETHER THE ENGINE OR CAR IS WITHDRAWN FROM SERVICE, AS DISTINGUISHED FROM BEING MERELY INTERRUPTED FOR REPAIR DURING THE COURSE OF AN INTERSTATE HAUL, TO GO ON AFTER THE REPAIR. ANY DISTINCTION BASED UPON THE CHARACTER OF USE OF THE ENGINE OR CAR WHILE IN USE, IS CONTRARY TO THE PURPOSE OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND INCAPABLE OF PRACTICAL APPLICATION TO INJURIES SUSTAINED BY REPAIR SHOP MEN, TO WHOM ALL ROLLING STOCK IN THE REPAIR SHOP IS ALIKE, AS TO JURISDICTIONAL QUESTIONS.

In our brief to this court in the *Brizzolara* case, *supra*, we urged the necessity for the adoption of a workable rule in the following language:

"We urge upon the court the necessity of a workable rule, in repair cases, to determine whether cases fall within the federal or state act. Litigants should be able to determine, with some certainty, which law to sue under. Inferior tribunals should have a definite and authoritative test by which to determine this question. Men are being hurt constantly in railroad repair cases. There is much confusion as to their rights. Counsel are unable to advise definitely, or lower courts to decide with assurance, and much hardship and increase in litigation is the result. As a practicable matter, any test of jurisdiction in repair cases should, therefore, be workable, i. e., one which counsel and inferior courts can apply with assurance, and tend towards the elimination of appeals on the jurisdictional question and loss of rights by bringing suits in the wrong forum.

We respectfully submit that the test we here contend for, and which we understand the Winters and Branson cases to adopt, is workable, susceptible of application without controversies and appeals, and is sound upon principle. This test is that all repairs upon rolling stock while withdrawn from service (other than snow plows at least) fall under state laws. We further respectfully submit that the proposed bases of differentiation submitted by petitioner between the Winters and Branson cases and the present, are unworkable, incapable of application, unsound and would increase rather than diminish the difficul-

ties of inferior tribunals and litigants in determining jurisdiction in repair cases."

It is an absurdity to require a workman in a repair shop to know or to ascertain at his peril, the past history and character of service of every engine or car which enters the shop for repairs. It is impossible for a shop employee to procure such information. An engine in a repair shop does not bear stamped upon it, a history of the nature and character of its past service. Neither can it be determined from an inspection of the engine to what division and service it is to be assigned upon leaving the repair shop. This information is in the possession of the railroad and inaccessible to shop employees contemplating bringing suits against the railroad company. As a test of jurisdiction, such previous service is impracticable.

Looking at the physical situation of shop employees, no principle of logic, expediency, or public policy, justifies a change in the *lex* with each engine or car which comes into the shop. The rights of shop employees should be based upon the character of their own work, not upon an accidental factor which is of no significance to them. In the repair shop all engines and cars stand alike.

As a practical matter, the repair of one engine or car while withdrawn from service is no more closely related to the immediate movement of commerce, interstate or local, than the repair of any other engine or car. All repair shop men should be treated alike for the purposes of jurisdiction.

Testing the different jurisdictional tests suggested by the letter and spirit of the Federal Employers' Liability Act, no reason appears for applying any other rule than that based upon the character of service of the engine or car *at the moment of the injury*. Such is the test prescribed by the letter of the act, which confers rights upon employees of interstate railroads only where injured *while engaged in interstate commerce*. Such is the test applied by this court to the switching of loaded freight cars. (*Ill Cent. R. Co.* vs. *Behrens*, 233 U. S. 473.) It is equally applicable to repair cases. If the engine or car is in service in interstate commerce at the moment of the injury to the repair man, or where it is interrupted for repairs during the course of an interstate haul, to go on when the repairing is completed (*Winters* case, *supra*) the repair service is within the federal act. If the car is not loaded or not enroute empty to another state or if the engine or car is withdrawn from service and sent to the shops for extended repairs, it is not in commerce of any kind at the time, and the repair service is not under the federal act. Such repair service is remote to the movement of interstate commerce. (Authorities cited in memorandum opinion in *Branson* case, *supra*.) The interstate commerce business of the railroad is going forward without present assistance from the repairman. (*Hudson & M. R. Co.* vs. *Iorio*, [U. S. Cir. Ct. of App.] 239 Fed. 855.)

We respectfully submit that the only jurisdictional test which fits the circumstances of repair shop work

and provides a clear and workable line of distinction between federal and state jurisdiction, convenient both to railroads and their shop workers, and which can be applied with assurance by inferior tribunals to the reduction of appeals and litigation upon jurisdictional grounds, is one based solely upon whether the engine or car is out of service at the time of the repairs, as distinguished from being repaired in the course of an interstate haul, regardless of the character of use of such engine or car while in service.

IV.

THE PRESENT CASE IS ANALOGOUS TO THAT OF NEW CONSTRUCTION OF TRACK OR ROLLING STOCK, HELD IN *RAYMOND* vs. *C. M. AND ST. P. R. CO.*, 243 U. S. 43, TO BE GOVERNED BY STATE LAW.

The locomotive in the present case was in the repair shops for several months for extensive overhauling and repairs, as well as for installation of new equipment. It was dismantled while in the shop. The new equipment to be added consisted of a superheating apparatus to increase steam pressure and in other miscellaneous additions.

It has been held by this court that the original construction of a tunnel or roadbed is not governed by the federal act. The object does not become an instrumentality of interstate commerce until put into use in carrying commerce.

Raymond vs. *C. M. & St. P. R. Co.*, 243 U. S. 43. The same is necessarily true of new construction of engines and cars.

By analogy the same rule should apply here. The overhauling and installation of new equipment was of so extensive a character as to invoke the same principle. While dismantled the engine was of no greater service to interstate commerce than if it were being newly built. As a present assistance in interstate commerce it falls within the principle of the *Raymond* case.

We therefore urge upon this court the granting of a writ of *certiorari* in this case to review the decision of the District Court of Appeal of California for the following reasons of public policy, as well as to accomplish justice in the particular case:

1. To clear the *Winters* and *Branson* cases, *supra,* of the ambiguity now existing, as to whether there is a distinction between engines engaged wholly in interstate commerce prior to being taken out of service for repairs, and engines engaged indiscriminately in interstate and intrastate commerce.

2. To establish a rule of jurisdiction to clearly fix the status of railroad shop employees, so that lower tribunals may act with assurance in determining jurisdiction.

3. To establish the rule beyond question, that all rolling stock while definitely out of service for a considerable period for repairs, is out from under the Federal Employers' Liability Act, regardless of

the character of use of the rolling stock while in service.

4. To do justice in the particular case.

Respectfully submitted.

WARREN H. PILLSBURY,
Counsel for Petitioners Industrial Accident Commission of the State of California and O. J. Burton.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No._____

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,
Petitioners,

vs.

JOHN BARTON PAYNE, AS AGENT UNDER SECTION 206, TRANSPORTATION ACT, 1920 (LOS ANGELES AND SALT LAKE RAILWAY COMPANY),
Respondent.

NOTICE OF DATE FIXED FOR SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To John Barton Payne, as Agent under Section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company) and to E. E. Bennett and Dana T. Smith, his attorneys in this proceeding:

GENTLEMEN: Please take notice that the petitioners in the above entitled proceeding have fixed Monday, the seventh day of March, 1921, as the date for

submission of their petition for *certiorari* in the above entitled proceeding, brought to review a decision of the District Court of Appeal of the State of California, Second Appellate District, Division Two, in the matter there entitled *John Barton Payne, as Agent under Section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company)*, Petitioner, vs. *Industrial Accident Commission and O. J. Burton,* Respondents, Civil No. 3296; and that on said date counsel for petitioner will move the Honorable Supreme Court of the United States at its courtroom at Washington, D. C., at 12 o'clock noon, or as soon thereafter as the matter can be heard, for the submission and granting of said petition.

WARREN H. PILLSBURY,
Attorney for Petitioners.

Dated at San Francisco, California, this fifth day of February, 1921.

State of California,
City and County of San Francisco. } ss.

Mildred Bird, being first duly sworn, deposes and says: That she is a clerk and stenographer in the office of the Industrial Accident Commission of the State of California, one of the petitioners herein; that the main office of such petitioner is in the city and county of San Francisco, State of California; that Warren H. Pillsbury, counsel for petitioners in this proceeding, is a member of the legal staff of said Industrial Accident Commission of the State

of California and has his office at the office of said Commission; that Messrs. E. E. Bennett and Dana T. Smith are the attorneys of record for John Barton Payne, the respondent herein, and have their offices in the city of Los Angeles, State of California; that there is a United States post office at said city of Los Angeles, with regular daily mail service between San Francisco and Los Angeles, California; that affiant on the fifth day of February, 1921, served copies of the within petition for *certiorari,* copy of opinion sought to be reviewed, brief in support of said petition, and notice of date fixed for submission of said petition for writ of *certiorari* (said date fixed for submission being March 7, 1921) in the above entitled proceeding, upon said Messrs. E. E. Bennett and Dana T. Smith, by depositing copies of the same in said United States mail properly enclosed in a sealed envelope with the postage prepaid thereon, said envelope being addressed as follows:

Messrs. E. E. BENNETT and DANA T. SMITH,
504 Pacific Electric Building,
Los Angeles, California.

(Signed) MILDRED BIRD.

Subscribed and sworn to before me this fifth day of February, 1921.

(SEAL)

C. B. SESSIONS,
Notary Public in and for the city and county of San Francisco, State of California.

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